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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 209

EMICH MOTORS CORPORATION AND U. S. ACCEPTANCE CORPORATION,

Petitioners,

vs.

GENERAL MOTORS CORPORATION AND GENERAL MOTORS ACCEPTANCE CORPORATION,

Respondents.

REPLY OF RESPONDENTS TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE.

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On December 22, 1950, the Solicitor General filed a "Brief for the United States as Amicus Curiae." The position taken and arguments made by the Solicitor General are considerably at variance with the contentions made in the brief for petitioners. Hence this separate reply, which is confined to the amicus brief.

STATEMENT OF FACTS.

Although the statement of facts in the amicus brief (Amicus Br., pp. 4-13) does not contain all of the facts necessary for a complete presentation of the questions involved in the limited grant of certiorari, the omitted matters will not here be repeated as the brief of respondents filed in reply to petitioners' brief summarizes the essential facts (Resp's. Br., pp. 2-10).

However, there are certain misstatements in the amicus brief which should be corrected.

At page 5 of the amicus brief it is stated that the indictment charged defendants with conspiring in restraint of interstate commerce in GMC automobiles "by monopolizing the business of financing sales of those automobiles." This was not the charge. At no time in the criminal case was it claimed that there had been a monopoly of the financing by defendants nor that any such monopoly constituted a restraint of interstate commerce (See Cr. R. 1056).

When the criminal case was tried it was believed by both defendants and the Government that the business of financing was local and not interstate commerce (Cr. R. 4607). Further, from a factual standpoint, it appeared that the use of GMAC stimulated rather than restrained interstate commerce in automobiles (Cr. R. 950). Indeed GMAC was formed for that specific purpose (Cr. R. 935-936, 939-940).

The charge in the indictment, and the theory on which the criminal case was tried, was that in their effort to promote the use of GMAC, defendants had conspired to do certain *other* things which restrained the interstate commerce of dealers in GMC automobiles (Cr. R. 9-15).

A second misstatement of fact in the amicus brief that the indictment charged that pursuant to the conspiracy the "defendants coerced dealers to use GMA financing facilities by various means, including threats cancellation and actual cancellation of dealers' franchis contracts" (Amicus Br., p. 5). This misconception of th indictment follows naturally from the misunderstandin of the nature of the conspiracy. The charge was not tha defendants had done these various things but that they ha *conspired* to do them. It was unnecessary for the jury i the criminal case to find any overt act (except for venu purposes) in order to convict. The jury was so instructe (R. 8543).

A third misstatement, appearing on page 9 of the amicu brief, is that in the instant case the charge to the jur that the criminal judgment was evidence of a conspirac "as charged in the indictment" in restraint of trade an commerce in automobiles "in the manner described i the indictment" was given "apparently without objectio from respondents."

Every part of this instruction was objected to strenu ously and constantly. The instruction was a condensatio of plaintiffs' requested instruction No. 8 (R. 9034-9035) Defendants filed three pages of objections to it pointin out in detail why the judgment could not be evidence o the conspiracy as charged in the indictment or of a re straint in the manner described in the indictment (R 9052-9054). These written objections were permitted b the court to stand to the instructions as given withou being orally repeated (R. 7426).

Furthermore respondents submitted their own propose instruction (R. 9018) and orally explained to the cour their reasons for insisting that the judgment was no relevant for any purpose and certainly not as evidence o

all of the terms or any specific term of the conspiracy.* During the discussion of instructions the following colloquy took place (R. 7050-7051):

> "The Court: May I interrupt before I forget it? I have glimpsed rather hurriedly through your suggested instructions, and I notice the plaintiff's suggested instructions go quite extensively into the question of that criminal indictment and the scope of the conspiracy, and so forth and so on; and I notice also a considerable lack of discussion of that subject on behalf of the defendants.
>
> "Now, I would like to have the defendants' view on that. You have seen the plaintiffs'. I have not read all the objections yet. Would you elaborate a little on that?
>
> "Mr. Hurd: Our objections go into that in quite some detail, but briefly it is this. Our position is it is a question of law, a question for the court to instruct the jury as to the extent to which the judgment is prima facie proof of something. As the statute says, the judgment should be prima facie proof as to those matters in which it would constitute estoppel between the parties, and it is a question of law to what extent the judgment in the criminal case would be an estoppel between the government and General Motors. And your Honor, therefore, has to decide what was determined in the criminal case and tell the jury what it was and say the judgment is prima facie proof of that particular thing, whatever it may be.
>
> . . . . .
>
> "Of course, we took the position, as your Honor knows, earlier in the case, that it could not be determined with any certainty what was decided in the criminal judgment, therefore there could not be any estoppel. We still take that position, but your Honor disagreed with us.

---

* This discussion occurred in the pre-trial hearing (R. 112) and repeatedly throughout the trial (R. 217-232, 325, 422-444, 745, 7050-7051, 7061, 7425-7431).

"Now, if we ar. wrong in this determination something must be determined with certainty, that must be merely what the defendants did, and conspired to do, one or more things, and conspired to do, in such a way as to unreasonably restrain trade. It is not true we have to conspire to do any one particular thing, so it is not true we have to conspire to cancel dealers, nor that we conspired to hold up cars to dealers who do not use GMAC and so on down the line. If we conspired to do one or more things, and each one or more is not known, therefore, we say it is improper to say that that is prima facie proof we agreed to do all those things or any particular one thing."

ARGUMENT.

I.

LEGISLATIVE HISTORY OF SECTION 5 OF THE CLAYTON ACT.

We agree with the amicus brief that the legislative history of this section does not shed a great deal of light on the problems in this case. The congressional debates do show

(a) That it was intended that the judgment be evidence only of matters determined in the Government action (51 Cong. Rec. 13851, 13853, 13901).

(b) That it was intended that the judgment should not preclude the right of defendants to relitigate the matters determined in the Government action (51 Cong. Rec. 13851, 13853, 13901, 16149).

(c) That Congress had some doubt as to the constitutionality of giving the judgment the effect of evidence after the introduction of evidence by defendants disproving the existence of the conspiracy (51 Cong. Rec. 13853, *et seq.*).

We disagree with the suggestion in the amicus brief that Congress was intent upon a civil plaintiff's receiving as much benefit from a criminal judgment as from a decree in equity (Amicus Br., pp. 13, 19). Congress applied the same test to one as the other but the nature of a decree is such as to show specifically what matters were determined while a criminal judgment may leave much doubt (as in the instant case). This problem did not concern Congress and indeed the whole question of extending the statute to criminal judgments as well as decrees was treated only perfunctorily by Congress. Witness the following (51 Cong. Rec. 13852):

"Mr. Cummins. One more question. If the House provision limited its operation to suits in equity

brought by the Government, does the Senator know why it was not extended to criminal prosecutions as well?

"Mr. Walsh. No; I do not."

II.

THE PRINCIPLES OF ESTOPPEL WHICH ARE APPLICABLE IN DETERMINING THE MATTERS AS TO WHICH A JUDGMENT IN A GOVERNMENT ANTITRUST CASE MAY BE USED AS PRIMA FACIE EVIDENCE IN PRIVATE SUITS.

The difference between the Solicitor General and respondents as to the principle of estoppel applicable under Section 5 of the Clayton Act seems to be more a matter of semantics than of substance. The amicus brief states that estoppel as used in the statute means the estoppel used in the general rule "that litigants are estopped to deny in a subsequent suit any matters that were * * * determined in a prior action between them * * *." (Amicus Br., p. 20.)

Respondents agree with this proposition. But the amicus brief then continues with the statement (Amicus Br., p. 22):

> "The familiar distinction between *res judicata* (estoppel in respect of causes of action) and collateral estoppel or estoppel by judgment (estoppel in respect to decided issues) is of no relevance here."

With that statement we disagree. The name that the law gives to the estoppel which prevents one from denying in a subsequent suit any matter determined in a prior action between them is "collateral estoppel" or "estoppel by judgment." *Commissioner* v. *Sunnen*, 333 U. S. 591, 597; *June* v. *George C. Peterson Co.*, 155 F. (2d) 963.

The case of *Commissioner* v. *Sunnen*, 333 U. S. 591, while recognizing that the term *res judicata* is sometimes loosely used to comprehend estoppel by judgment, emphasizes that where the causes of action are different, the applicable

doctrine is that of estoppel by judgment, and stresses the limitations thereof. See *id.*, pages 597-598:

> "But where the second action * * * is upon a different cause or demand, the principle of *res judicata* is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but *"only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."* * * * In this sense, *res judicata* is usually and more accurately referred to as estoppel by judgment, or collateral estoppel." (Italics ours.)

The term "estoppel" by itself is a generic term and only by an examination of the context in which it is used and the contemporary interpretation given it by those who used it (Congress in this case) can its meaning be determined. As shown in respondents' brief filed December 27, 1950, in reply to petitioners' brief, such an examination discloses that, as used in Section 5 of the Clayton Act, the term "estoppel" means collateral estoppel or estoppel by judgment (Resp's. Br., pp. 14-15).

Once this is determined, the inquiry follows as to what are the limits of estoppel by judgment. These limits are well settled.

An estoppel by judgment exists only as to facts which necessarily were determined in the prior action. Any ambiguity or uncertainty as to whether a particular ultimate fact was determined will prevent an estoppel as to that fact. Thus in *Russell* v. *Place*, 94 U. S. 606, this Court held that a judgment for the plaintiff in an action at law upon a patent containing two claims did not estop the defendant from contesting the validity of the patent in a

subsequent suit to enjoin infringement, stating (pp. 608-609):

> "* * * But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record,—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment *may have passed,* without indicating which of them was thus litigated, and upon which the *judgment was rendered,*—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. * * *
>
> "* * * The verdict may have been for an infringement of the first claim; it may have been for an infringement of the second; it may have been for an infringement of both. The validity of the patent was not necessarily involved, except with respect to the claim which was the basis of the recovery. A patent may be valid as to a single claim and not valid as to the others. The record wants, therefore, that certainty which is essential to its operation as an estoppel." (Italics ours.)

See also *Packet Company* v. *Sickles,* 5 Wall. (72 U. S.) 580; *In re Power,* 115 F. 2d 69 (C. C. A. 7); *The Evergreens* v. *Nunan,* 141 F. 2d 927 (C. C. A. 2).*

In determining what was decided in the prior litigation the entire record, including instructions to the jury, may be examined, but unless this examination removes all question, there is no estoppel. In *De Sollar* v. *Hanscome,* 158 U. S. 216, this Court held estoppel by judgment inapplicable

* The same rule has been uniformly followed in the state courts. See, *e. g., Hoffman* v. *Hoffman,* 330 Ill. 413, 161 N. E. 723; *Paulos* v. *Janetakos,* 46 N. M. 390, 129 Pac. 2d 636, 142 A. L. R. 1237; *Farmers & Fruit-Growers Bank* v. *Davis,* 93 Ore. 655, 184 Pac. 275.

although the situation was much more favorable than here, inasmuch as the factual issue as to which the estoppel was claimed had been referred to in the instructions to the jury in the prior litigation as the "chief question," and there was only one alternative hypothesis upon which judgment could have been rendered. The Court's comment is directly in point (pp. 221-222):

> "We have simply the record of the former judgment, including therein the testimony and the charge of the court from which to determine that fact * * *. We are not now concerned with the inquiry whether the instructions of the court were correct or not. We look to them simply to see what questions were submitted to the jury, and if they left it open to the jury to find for the defendant upon either of the two propositions, and the verdict does not specify upon which the jury acted, there can be no certainty that they found upon one rather than the other. The principal contention, therefore, of the plaintiff fails."

See also *Washington Gas Co.* v. *Dist. of Columbia,* 161 U. S. 316; *United States Fidelity & Guaranty Co.* v. *McCarthy,* 33 F. (2d) 7.

The principle is equally applicable to general verdicts and special verdicts. In *Packet Company* v. *Sickles, supra,* 5 Wall. (72 U. S.) 580, the declaration in the former suit contained four counts to which the general issue was pleaded, and a general verdict was returned for the plaintiffs. In the second suit the plaintiff showed by proof that the jury had *considered* the matter as to which the plaintiff claimed an estoppel. In holding that the prior adjudication did not operate as an estoppel, this Court said (p. 592):

> "* * * but, even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and *judgment necessarily involved* its con-

sideration and *determination,* it will not be concluded." (Italics ours.)

See also *Hines* v. *Welch,* 23 F. (2d) 979, 985; *Burlen* v. *Shannon,* 99 Mass. 200, 96 Am. Dec. 733; *Wright* v. *Griffey, et al.,* 147 Ill. 496, 35 N. E. 732.

The foregoing authorities establish two basic principles involved in the application of estoppel by judgment:

1. A prior judgment can be used as evidence in a subsequent litigation only in respect of issues of fact which were *actually determined* in the prior suit and were *necessary* steps in reaching the conclusion.

2. To determine what issues were thus actually and necessarily decided in the prior litigation, recourse may be had to the pleadings and record in the prior action.

At one point the amicus brief seems to be in complete agreement with these propositions* and at another it talks about giving Section 5 the "broadest permissible construction"** and states that an enlargement of "the scope of the criminal judgment" would not place an unreasonable burden on defendants since it would only require them to go "forward with the evidence" (Amicus Br. p. 31).

This latter proposition, if it is of any significance, is not a sound basis for giving the judgment an effect beyond that which it would receive under the doctrine of collateral estoppel. The same argument might be advanced for the rece t of any irrelevant, incompetent or immaterial evidence. It might always be said that the evidence couldn't hurt as the other party would have the opportunity to re-

* On page 23 the amicus brief states, "The difficult problem * * * is to determine what matters have actually been adjudicated in the criminal case * * *."

** (Amicus Br. p. 22.) If this is to be a construction different from that advocated by respondents, the amicus brief does not define it.

fute it, but this is not the premise which fixes the rules of evidence. Cf. *Tot* v. *United States,* 319 U. S. 463, 469.

The amicus brief also states that giving the indictment to the jury might assist it in "understanding" what the court charges as to the criminal judgment (Amicus Br. p. 30). This might conceivably be true in some circumstances, but not in the instant case. The South Bend indictment was so involved that even lawyers have difficulty understanding it (note the misinterpretation placed upon it in the amicus brief discussed *supra,* pp. 2-4).

It contained charges abandoned on the trial;* confusing repetition;** surplusage regarding Ford Motor Company and Chrysler Corporation;† and allegations of a conspiracy containing twenty-six terms, a finding of any one of which was sufficient for a conviction. These facts, considered in the light of the instructions in the criminal case (R. 8535-8536) to the effect that it was not necessary for the Government to prove all of the terms of the conspiracy or everything alleged, make the indictment of no possible aid to the jury in the civil case. Indeed, even the trial court in the civil case asked (R. 7061):

> "How can a judge ever determine what that (criminal) jury had in mind?"

We do not contend that a general verdict precludes the examination of the entire record (as the amicus brief suggests, p. 27), for the purpose of determining, if possible what was necessarily decided in the criminal case, but we do say (a) that this determination is a question of law and must be made by the court and not the jury, (b) that giving the indictment to the jury in the instant case could

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* *E. g.*, paragraphs 39 (R. 21) and 47 (R. 23) and participation by Cadillac (R. 21).

** *E. g.*, paragraphs 34 (R. 21) and 72 (R. 27). Note: This confused even the criminal jury (R. 8544-8547).

† *E. g.*, paragraphs 68 and 69 (R. 26). The criminal jury were instructed to disregard these charges (R. 8533-8534).

only confuse and not aid, and (c) that a study of the entire criminal record does not disclose that the judgment in that case necessarily determined any matter relevant to the supposed cause of action of the plaintiffs in this proceeding.

III.

THE EFFECT OF THE CRIMINAL JUDGMENT AGAINST RESPONDENTS AS PRIMA FACIE EVIDENCE IN THE PRESENT ACTION.

The brief of the Solicitor General disagrees with both of the lower courts and all of the parties as to what was necessarily determined in the criminal case and therefore as to the effect which it should be given in this civil action (Amicus Br. p. 33).

It states that the criminal case determined (1) that respondents conspired to restrain dealers' commerce in GMC cars and (2) that "the conspiracy was effectuated by coercion" (Amicus Br. pp. 32, 33). The first of these matters has been answered in respondents' brief filed December 27, 1950 in reply to petitioners' brief (Resp's. Br. pp. 19-24) and will not be repeated.

As to the second matter, there are two answers: First, the criminal case could not determine that anything was done to effectuate the conspiracy as the offense was the entering into of the conspiracy and not its execution or effectuation; and second, the term "coercion" is itself a nebulous term which means different things to different people in varying contexts but which is relevant to plaintiffs' case only if it includes withholding cars and cancellation of dealerships.

To assume that it was necessary for the Government to prove overt acts in order to show a restraint of trade misconstrues the nature of the criminal action. That case involved a violation of Section 1 of the Sherman Act which

condemns "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade" and not acts committed pursuant to conspiracies. It was unnecessary for the Government to prove any overt act and the jury's verdict could not have constituted a finding with respect to any overt act (except for venue). *Nash* v. *United States*, 229 U. S. 373, 378.

It is true that considerable evidence of conduct was introduced in that case to prove circumstantially the existence of the conspiracy; however, the court of appeals pointed out in affirming that judgment (121 F. 2d 376, 402):

> "It is (was) plainly inferable from the evidence, quite apart from the concrete acts and things done, that a conspiracy had been formed."

As a finding that the conspiracy was "effectuated" was not essential to a conviction, there can be no estoppel as to that and consequently the judgment cannot be evidence that "the conspiracy was effectuated by coercion."

Furthermore, although the term "coerce" was used in the indictment in connection with a few of the terms of the conspiracy,* it was not employed in connection with the only charges at all material to plaintiffs' claims, those as to withholding of cars or cancellation of franchises (R. 22). Consequently, if the Solicitor General is using the term "coercion" as employed in the indictment, a finding as to such "coercion" would be irrelevant. Conversely, if the Solicitor General is using the term "coercion" in a broad sense as covering *all* of the terms of the conspiracy, his contention that the judgment constituted *prima facie* evidence of such "coercion" is concededly erroneous, since the amicus brief admits that the verdict did not necessarily determine the existence of all of the alleged terms.

* The amicus brief states (p. 36), "It of course cannot be demonstrated as a logical certainty that the jury's determination was based upon the finding of coercive use of the cancellation clause."

The Solicitor General is therefore confronted with the dilemma of admitting that "coercion" is an uncertain expression which may make its use in an instruction prejudicial, or contending that it encompasses every charge in the indictment which he concedes would be going too far in view of the criminal record.

Although we believe that the Court of Appeals went too far in concluding that the criminal judgment was admissible for any purpose in this case, nevertheless, whether the court was right or wrong, it would be unsound to give the judgment the effect advocated in the amicus brief.

Respectfully submitted,

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